



School of Law
UNIVERSITY OF GEORGIA

Digital Commons @ University of
Georgia School of Law

Land Use Clinic

Student Works and Organizations

10-1-2006

Protecting the Future Forever: Why Perpetual Conservation Easements Outperform Term Easements

Paul Mitchell
University of Georgia School of Law

Repository Citation

Mitchell, Paul, "Protecting the Future Forever: Why Perpetual Conservation Easements Outperform Term Easements" (2006). *Land Use Clinic*. 10.
<https://digitalcommons.law.uga.edu/landuse/10>

This Article is brought to you for free and open access by the Student Works and Organizations at Digital Commons @ University of Georgia School of Law. It has been accepted for inclusion in Land Use Clinic by an authorized administrator of Digital Commons @ University of Georgia School of Law. [Please share how you have benefited from this access](#) For more information, please contact tstriepe@uga.edu.

Protecting The Future Forever: Why Perpetual Conservation Easements Outperform Term Easements

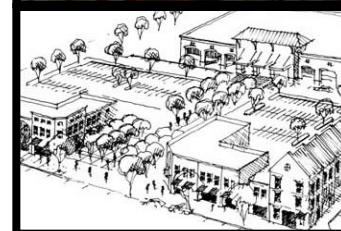
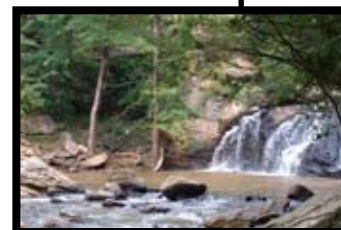
Paul Mitchell
Fall 2006

Land Use Clinic



university of georgia

School of Law & College of Environment and Design



The **UGA Land Use Clinic** provides innovative legal tools and strategies to help preserve land, water and scenic beauty while promoting creation of communities responsive to human and environmental needs. The clinic helps local governments, state agencies, landowners, and non-profit organizations to develop quality land use and growth management policies and practices. The clinic also gives UGA law students an opportunity to develop practical skills and provides them with knowledge of land use law and policy.

For more information about the UGA Land Use Clinic contact:

Jamie Baker Roskie, Managing Attorney
UGA Land Use Clinic
110 Riverbend Road, Room 101
Athens, GA 30602-1510
(706) 583-0373 • Fax (706) 583-0612
jroskie@uga.edu

Protecting The Future Forever: Why Perpetual Conservation Easements Outperform Term Easements

Author: Paul Mitchell

Editor: Jamie Baker Roskie
University of Georgia Land Use Clinic

Fall 2006

Table of Contents

I. Introduction.....	1
II. Arguments for making conservation easements perpetual.....	2
A. Benefits to Landholders.....	2
B. Benefits to Easement Holders.....	3
C. Benefits to Governments	4
D. Benefits to the Public.....	4
E. Benefits to Future Purchasers.....	4
F. Benefits to Neighbors.....	5
G. Benefits to Developers.....	5
H. Benefits to the Environment.....	5
III. Arguments Against Allowing Conservation Easements in Perpetuity.....	6
IV. Conclusion.....	8
Appendix A: Georgia Uniform Conservation Easement Act.....	9
Appendix B: Qualified Conservation Contribution.....	13

Protecting The Future Forever: Why Perpetual Conservation Easements Outperform Term Easements

Paul Mitchell
Fall 2006

I. Introduction

Conservation easements are amassing increasing popularity as a private means for accomplishing a public good. In 1980, conservation easements protected 128,001 acres.¹ By 2003, that number had jumped to over 5 million acres.² In Georgia, over 131,000 acres had been protected by conservation easements by the end of 2005, more than double the acreage of just a few years before.³

A conservation easement is a legal arrangement whereby a landowner chooses to transfer certain development rights to an eligible easement holder, usually a non-profit or government agency, in order to achieve a qualified purpose.⁴ The landowner can sell

or donate these development rights. If the easement is made in perpetuity and is either donated or transferred in a “bargain sale,”⁵ the landowner may be eligible for federal income tax, estate tax, state income tax, and property tax deductions.⁶

In states such as Georgia, conservation easements can exist in perpetuity or be limited to a term of years.⁷ The rising popularity of conservation easements makes the distinction between perpetual and fixed-term easements ever more important.

Evaluating the advantages and disadvantages of perpetual as opposed to fixed-term easements is not as simple as simply looking at the landowner and the easement holder. The stakeholders in a conservation easement transaction may also include multiple levels of government, the public, future purchasers of the burdened property, abutting and nearby neighbors, developers, and the environment itself. Weighing the costs and benefits to each of these stakeholders gives a more complete picture of the risks and opportunities that perpetual easements provide.

The argument in favor of a policy preferring perpetual conservation easements will proceed as follows: First, the memo will discuss the benefits of perpetual conservation easements from the standpoint of each of the stakeholders. Second, the memo will outline the downside to each stakeholder. Third, the memo will conclude that the upside of perpetual easements far outweighs the downside, and recommend that landowners and governments continue to use perpetual easements to conserve land.

1 Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 Harv. Envtl. L. Rev. 421, at 423 (2005).

2 *Id.* See also, Elizabeth Byers and Karin Marchetti Ponte, *The Conservation Easement Handbook*, Land Trust Alliance and The Trust for Public Land, 2d ed., p. 8 (2005). The Land Trust Alliance regularly updates this census number on its website located at www.lta.org.

3 Georgia Land Trust Service Center. *The Use of Conservation Easements in Georgia, an Incomplete Snapshot*. Accessible at: <http://www.galandtrust.org/PDF%20files/CE%20Use%20in%20Georgia.pdf> Last viewed on April 24, 2006. The report explains that the picture is incomplete because it does not include easements held by local governments. Nevertheless, the number of acres of land under conservation easement has increased from 61,861 acres in July 2002 to 131,001 in December 2005, a 212% increase in three and a half years.

4 O.C.G.A. § 44-10-2(1) (2006). ““Conservation easement” means a nonpossessory interest of a holder in real property im-

posing limitations or affirmative obligations, the purposes of which include retaining or protecting natural, scenic, or open-space values of real property; assuring its availability for agricultural, forest, recreational, or open-space use; protecting natural resources; maintaining or enhancing air or water quality; or preserving the historical, architectural, archeological, or cultural aspects of real property.” *Id.* A full-text version of the Georgia conservation easement statute is provided in Appendix A.

5 “Bargain sale” refers to selling at below fair market value to a qualified easement holder.

6 See “Benefits to Landholders” for a discussion of the benefits of donating in perpetuity, *infra*.

7 O.C.G.A. § 44-10-3(c) (2006). A conservation easement in Georgia is presumed to be held in perpetuity unless it expressly states otherwise (“Except as provided in subsection (c) of Code Section 44-10-4, a conservation easement is unlimited in duration unless the instrument creating it otherwise provides.” *Id.*).

II. Arguments for making conservation easements perpetual

To some, the logic of making conservation easements last forever seems self-evident. The land isn't going anywhere,⁸ and developing farms into subdivisions or open space into parking lots is generally seen as a one-way ratchet towards increasing environmental degradation.⁹ For the landowners themselves, especially those who inherited their cherished plot, there may be the desire to keep the land as they found it, and guarantee that neither their children nor their children's brokers may ever spoil it. These feelings run deep.¹⁰ Deeper still runs the logic that the more restrictions on development the better, and perpetual easements restricting development are better than fixed-term easements¹¹ precisely because they are more restrictive.

8 Of course, this varies by location. In the case of land erosion, the land *is* going somewhere: downstream or out-to-sea.

9 But see Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 Va. L. Rev. 739, 787 (2002) (objecting to perpetual conservation easements because, *inter alia*, the premise that land cannot go from a developed to an undeveloped and natural state is invalid, and that therefore perpetual conservation easements are unnecessary).

10 Although the evidence is anecdotal and outside the scope of this memo, the Nature Conservancy and the Vermont Land Trust, among others, provide testimonials on their websites of landowners whose feelings for their land and for the future prompted them to protect their land with perpetual conservation easements.

11 Many states have adopted the Uniform Conservation Easement Act (UCEA). As of 2003, 23 states had enacted legislation based on the Act, and 26 states had drafted and enacted their own laws. Elizabeth Byers and Karin Marchetti Ponte, *The Conservation Easement Handbook*, Land Trust Alliance and The Trust for Public Land, 2d ed. p. 12 (2005). However, Wyoming, the lone holdout, has since enacted enabling legislation based on the UCEA. See Wyoming Statute §§ 34-1-201 through 207 (2006).

Legislation based on the UCEA allows for both perpetual and fixed-term easements. Some states, such as North Dakota (99 years), allow only for fixed-term easements. Enabling legislation is necessary because conservation easements did not exist in the common law. For a critical discussion regarding the legal status of conservation easements generally, see Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of Gross Real Covenants and Easements*, 63 Tex. L. Rev. 433 (1984). The categorization and justification of conservation easements generally is outside the scope of this memo; Professor Korngold and others do the subject sufficient justice.

Some of the benefits of perpetual easements inure to everyone. The environmental benefits are perhaps the most obvious public good that conservation easements provide. The argument, then, in favor of perpetual easements is that they provide these environmental benefits forever, and are therefore more desirable. Indeed, it is the private providing of public goods that makes conservation easements such an exciting tool to begin with.¹²

Furthermore, perpetual easements make up with stability what they take away from flexibility. Barring an action in eminent domain or court-ordered destruction of an easement because of changed conditions, or some similar event, land encumbered by a perpetual easement will remain that way forever. The stability that perpetual easements create helps people more efficiently plan their current and future uses of nearby land.

A. Benefits to Landholders

The current landowner who encumbers her land with a conservation easement realizes several advantages in choosing perpetuity over a fixed-term. First, under Internal Revenue Code 170(h),¹³ a conservation easement must be made in perpetuity in order to qualify for federal income tax deductions. These benefits can be substantial: up to 30% of an individual's income can be deducted for up to 6 years, depending on the value of the donated easement. Similarly, perpetual easements can dramatically lower federal estate taxes; term easements cannot. Also, in states such as Georgia, easements must be perpetual in order to qualify for state income tax reduction.¹⁴ Property taxes

12 See e.g. Federico Cheever, *Environmental Law: Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 Denv. U. L. Rev. 1077, 1077-78 (1996)(discussing the appeal of providing public goods through private transactions, especially when landowners interact with qualified non-governmental donees).

13 Internal Revenue Code 170(h), 26 USCS 170(h) (2006).

14 The Georgia General Assembly passed HB1107, the Land Conservation Tax Credit, on March 1, 2006 by unanimous votes in both the House (156-0; voting occurred on February 8, 2006) and the Senate (49-0). Upon signing the bill into law, Governor Sonny Perdue remarked "I'd like to thank the General Assembly for passing this legislation and giving landowners an incentive to donate land or a conservation easement to help protect Georgia's natural beauty. This tax credit upholds Georgia's long tradi-

might also be lowered, provided that the landowner receives a new property tax assessment.¹⁵

The estate tax reduction alone might make the difference between keeping the land in the family upon the landowner's demise or forcing the heirs to sell off land just to pay taxes. However, it's not all about money. Stephen J. Small, the attorney who helped draft the Internal Revenue Service regulation allowing for tax benefits for qualified easement donations, said "Most people who donate conservation easements do so for three reasons: they love their land; they love their land; they love their land."¹⁶ Tied up with this love for their land is the related desire to protect the land they love forever.¹⁷

tion of private ownership and conservation by keeping land for conservation as private property. I learned long ago that if you take care of the land it will take care of you, and I look forward to signing the Land Conservation Tax Credit into law." Georgia Governor Sonny Perdue. *Statement of Governor Sonny Perdue Regarding Final Passage of the Land Conservation Tax Credit*. Accessible at: <http://www.gov.state.ga.us/press/2006/press1074.shtml>.

15 O.C.G.A. § 44-10-8 (2006).

16 Christopher West Davis, "Pushing the Sprawl Back: Landowners turn to Trusts" *New York Times*, Section 14WC; Column 1; Westchester Weekly Desk; Pg. 1 (October 12, 2003).

17 The Vermont Land Trust (VLT), which accepts only perpetual conservation easements, posted the following on its website: "Although the tax and financial benefits were usually important considerations, the owner's primary motivation for conserving the property was to ensure that the land would be protected and cared for, even after their own ownership ends. Many were motivated by the desire to give something back to their communities and the belief that future generations will need open space. In 1999, the American Farmland Trust commissioned an independent survey of 130 owners of conserved farms in Vermont. Over half of the farmers responded that their primary motivation was to protect the land for farming in the future. Easements that would allow the land to be developed after 20 or 30 years would not meet the objectives of these owners." Accessible at Vermont Land Trust, "Land Conservation, The Case for Perpetual Easements," http://www.vlt.org/perpetual_easements.html, last viewed on April 25, 2006. Similar information is available in a question-answer format regarding the desirability of perpetual easements over term easements on the Nature Conservancy's website article entitled "Conservation Easements, Facts vs. Fiction," located at <http://www.nature.org/aboutus/howwework/conservationmethods/privatelands/conservationeasements/about/myths.html>.

B. Benefits to Easement Holders

While landowners gain peace of mind and either tax breaks (if they donate the easement) or cash (if they sell the easement), donees realize benefits of their own. Organizations that accept donations of conservation easements are able to achieve their conservation purposes more cheaply because they do not have to pay for full title in order to protect a particular parcel of land.

In order for the donor to qualify for tax deductions, the donee/holder of the easement must meet the requirements of Internal Revenue Code 170(h)(3).¹⁸ However, even if the donor does not have tax breaks on her mind, she is not free to grant a conservation easement to whomever she pleases. Because conservation easements are creatures of statute, one must check the governing statute to see the requirements for qualified holders. In Georgia, the easement must be granted to a government agency or a non-profit conservation organization.¹⁹

The easement holder has the responsibility to inspect the burdened property and enforce the restrictions embodied by the easement. In exchange, the holder is able to guarantee that the conservation purposes of the easement are being fulfilled. The government agency or qualified non-profit agency (such as a land trust) ostensibly desires to conserve land and can do so much more cheaply via a perpetual as opposed to a term easement. At the end of the term, the landowner would have to re-agree to the restrictions and in the case of purchased easements, the holder would have to repurchase the easement, making conservation much more expensive. Given rising land costs, transaction costs, and the uncertainty of whether or not the easement could even be renewed, holders have many reasons to prefer perpetual easements. The Vermont Land Trust poses a convincing hypothetical situation demonstrating the cost-savings of buying/accepting perpetual rather than term easements because even though a perpetual easement might cost a little more up front, it is much cheaper in the long run.²⁰

18 26 USCS 170(h)(3) (2006).

19 O.C.G.A. § 44-10-2(2) (2006) (defining "holder," also reprinted in Appendix A).

20 Vermont Land Trust, *supra* note 16.

One argument made in favor of term easements is that they would

C. Benefits to Governments

The government,²¹ whether or not it is the easement holder, benefits from conservation easements because un- or underdeveloped land requires fewer government services. The rebuttal argument might be that restricted land also provides less tax revenue, but the argument only carries weight if it can be assumed that government tax income will exceed its outlays for roads, schools, utilities, etc. In any event, lands protected by conservation easements demand fewer government services, thus saving the government money.

Also, to the extent that the government pays for

be less costly, thereby allowing more land to be conserved at the same cost. This may be true, but only in the short run. If we use the IRS tables to establish present values, a 20-year easement would cost approximately two-thirds of a perpetual easement. A 30-year easement would cost about 75%. However, because of increasing land values, the cost of renewing the easement at the end of the 20- or 30-year term would be far higher, if indeed the landowner is even interested in doing so.

Take the example of a property worth \$250,000 today. Assume that the easement value is 40% (\$100,000) and that the 40% ratio remains constant throughout a 20-year term. . . . [I]f property values rise at a modest average rate of 5% per year, the farm will be worth \$663,324 at the end of 20 years. The easement value (40%) would be worth \$265,330, and the cost of renewing the 20-year easement (67%) would be \$177,771.

If, on the other hand, property values rose on average at the rate of 10% per year, the farm would be worth \$1,681,874 after 20 years. The easement value (40%) would be \$672,750, and the cost of renewal (67%) would be \$450,742. Even assuming that the landowner will be willing to renew the easement after 20 years, it seems unlikely that the State of Vermont or other funding sources would be willing to raise the extra millions of dollars required to continue a temporary holding action.

For the land trust, which negotiates and holds conservation easements, term easements offer no savings in transactional or administrative costs. The cost of appraisals, legal drafting, title searches, mapping, and monitoring the easements are virtually the same, whether the easement is perpetual or for a specific term. *Id.*

²¹ “Government” is a short-hand way of referring to federal, state, and local government. Each level of government, however, has different costs and benefits associated with whether easements are perpetual or for a fixed term. For example, the federal government, and some states, forgo a percentage of income tax revenue based on the value of the donated easement. The federal government also allows for deductions from the inheritance tax, and local governments may allow for reduced property taxes if the conservation easement lowers the appraised value of the land.

the easements (by allowing for tax reductions), the government should prefer perpetual easements because the government would only have to pay once for the value it receives. Perpetual easements preclude having to entice another donation of the same property by granting tax benefits once again. Government also benefits to the extent that the easements provide environmental services such as improving water or air quality. Additionally, some easements may provide recreational areas or scenic views at much less cost than paying for fee simple title.

D. Benefits to the Public

The public gains more from perpetual easements, as well. The public essentially represents everyone, individuals, communities, corporations, and governments. The public benefits more from perpetual easements than from fixed-term easements because perpetual easements are more efficient. Perpetual easements do more good at less cost: they provide the public goods of improved air quality and water quality. They may stave off roadway congestion, urban sprawl, or increased demand for public services. They may provide open space or preserve historic sites. And if the easement holder is a private, non-profit organization, perpetual easements perform all of these services at no direct cost to the government because private organization will bear the oversight functions and administrative costs.

E. Benefits to Future Purchasers

Future purchasers of the burdened property do not receive the tax benefits that the easement donor receives, but they will be able to buy the land at a lower price. A prospective buyer interested in buying a farm in an area where farms are being subdivided into residential tracts might not be able to buy that farm if it was not protected by a conservation easement. The fact that conservation easements “run with the land” preserves future purchasing options that might otherwise disappear. Perpetual easements make these options—such as buying larger tracts of preserved land—possible.²² Perpetual easements limit the

²² Diana Shaman, “In the Region/Long Island; Much of Shoreline North Fork Tract to Be Preserved” *The New York Times*, Section 11; Page 9; Column 1; Real Estate Desk (November 12, 2000) (explaining that shoreline developments would be allowed along coastline but that the tracts were covered by con-

speculation that might occur if a term easement was in place, and this limit on speculation gives future buyers options that might otherwise be impossible.

F. Benefits to Neighbors

The abutting and nearby neighbors gain the same things that the public gains, but they do so to a greater degree. The scenic views, open space, and reduction in congestion benefit the neighbors more than anyone else. Having these benefits last in perpetuity is significant. Many are the owners who moved into a house for the farmland view, only to see the pasture turn into parking lots or subdivisions.²³

G. Benefits to Developers

Developers might not gain as much as others from perpetual conservation easements, but they do receive the benefits that accrue to the public. Developers of nearby or adjacent properties might actually do better than otherwise because the properties would be more valuable due to their proximity to the protected land.

H. Benefits to the Environment

Environmentalists have more to gain from perpetual as opposed to term easements, too. Once a piece of property is protected by a perpetual easement, it will, in theory, remain protected. For groups concerned with protecting as much land as possible for as long as possible, perpetual easements do what term easements cannot: last. In addition to the lower transaction, administrative, and acquisition costs already mentioned by the Vermont Land Trust (VLT), the VLT also explains that perpetual easements allow environmental groups access to matching funds that would not be accessible for term easement acquisition.²⁴

ervation easements that preserved much of the natural beauty of the area).

23 *Id.*(retelling the experience of the business executive who placed conservation easements on the shoreline land after having moved into a home that backed up to unprotected farmland that is now filled with 25 houses that he can see from his back porch).

24 Vermont Land Trust, *supra* note 16. The VLT states that a policy of purchasing term easements would jeopardize its leverage from other public and private funding sources. In 2001 and 2002, VLT conserved 77 working farms. The easement value of these 77 projects totaled approximately \$17 mil-

Perhaps the greatest service that only perpetual easements can provide is the permanent protection of irreplaceable places and habitats. Whether the easement protects an historic farm or the habitat of an endangered species, perpetual easements are the best way to ensure that unique environmental values continue into the future. For example, conservation easements have played an important role in protecting the Northern Forest in the American northeast.²⁵ Anyplace where unique environmental values are at stake, perpetual easements provide permanent protection against an irrevocable loss.

Perpetual conservation easements may also benefit the environment in ways that are currently unknown or underappreciated. By restricting development that destroys or impairs the environment, even if all of the short-term and especially long-term damage is unknown, perpetual easements may promote the goals of the precautionary principle. Essentially, the precautionary principle states that “under conditions of substantial scientific uncertainty environmental regulations should err on the side of caution in order to prevent harm.”²⁶ Perpetual conservation easements

lion. VHCBS grants covered \$8.35 million. Of the \$8.35 million, over \$1.5 million came from the federal Farmland Protection Program (FPP)** and \$282,000 from a transportation enhancement (TEA-21) program. The State’s money accounted for \$6.5 million (38%) out of the \$17 million. The remaining \$8.8 million came from a combination of foundation grants, local fundraising, bargain-sales, and individual gifts. This high degree of leverage for State funds is one of VHCBS’s success stories.

Should the State of Vermont decide to shift to a program of term easements, these other funding sources would no longer be available. The federal Farmland Protection Program, which requires a 1:1 match, is available only for perpetual easements. All of the foundation grants and probably most individual contributions are available only for perpetual easements. Although 20- or 30-year easements may seem less costly, at least in the short run, they would still be more expensive for the State, because it would pay 100% of the cost. *Id.*

25 Laura S. Beliveau, Comment, *The Forest Legacy Program: Using Conservation Easements to Preserve the Northern Forest*, 20 B.C. Env’tl. Aff. L. Rev. 507 (1993).

26 Stephen Charest, *Bayesian Approaches to the Precautionary Principle*, 12 Duke Env. L. & Pol’y F. 265-266 (2002). Mr. Charest goes on to write that:

The Rio Declaration on Environment and Development states that “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats

not only provide protection in the many, readily identifiable environmental areas such as air and water quality, they also protect benefits that are yet to be discovered.

The environment benefits more from perpetual as opposed to term easements. Less development seems to do more for the environment; therefore the program that does the most to restrict development should in turn do the most good for the environment. Perpetual conservation easements protect the environment more than ones of limited duration simply because they protect for a longer period of time.

III. Arguments Against Allowing Conservation Easements in Perpetuity

The disadvantages of perpetual easements accrue to each relevant stakeholder in different amounts. The decreased land use flexibility and decreased tax revenue represent some of the costs of promoting perpetual conservation easements. The question is whether the benefits outweigh the costs.

of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” Advocates argue that the Precautionary Principle merely reinforces common sense notions of environmental stewardship. However, opponents view it as a fundamentally unscientific rule of decision that exploits the public’s fear of the unfamiliar and promotes radical environmental agendas or protectionist trade policies disguised as environmental regulations.

Advocates further argue that the application of the Precautionary Principle is justified by science’s demonstrated fallibility in anticipating environmental harms such as asbestosis and ozone depletion. Additionally some potential environmental hazards cannot be quantified with certainty by existing scientific methods. Thus the Precautionary Principle would allow such harms to be regulated even if conclusive proof of harm has yet to be established. *Id.* at 266 (citations omitted).

The detractors of perpetual easements point to the high costs, restrictions on freedom, and impracticability of burdens that last forever. Speaking about perpetual easements generally, Professor Julia D. Mahoney said that it is an “illusion” to think that conservationists “can save nature through calculated efforts to restrict the options of future generations.”²⁷ She continued, “Future generations either will be stuck with the land preservation choices made by their forbears, which will almost certainly fail to reflect contemporary cultural values and advances in ecological science, or will have to expend resources to extinguish, or at the very least renegotiate” the restrictions.²⁸ All of this, while present landowners get tax breaks and “emotional satisfaction.”²⁹

Professor Mahoney isn’t alone in her criticism. Professor Gerald Korngold wrote about the irony of the present generation making land use restrictions that would hinder, not help, the future.³⁰ He wrote “the choice of the best current use of a parcel of land is difficult enough; more difficult still is the decision today regarding future use, because future needs are more speculative. Rigid choices today may defeat the right of future generations to make critical decisions affecting their lives.”³¹

Certainly, the inability to see the future and know the needs of the future presents a challenge. However, this is a sword that cuts both ways. The inability to see the future argues perhaps even more persuasively for adherence to the precautionary principle. Precisely because we cannot know the future or what resources we will need, we should conserve the most that we can and be cautious about our land use practices.

The strongest rebuttal to the precautionary principle is that either we do know just what we need or else that the resources protected by perpetual conservation easements are inexhaustible. Professor Korngold

27 Davis, *supra* note 15. See also Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 Va. L. Rev. 739 (2002).

28 Davis, *supra* note 15.

29 *Id.*

30 Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of Gross Real Covenants and Easements*, 63 Tex. L. Rev. 433 (1984).

31 *Id.* at 442.

concedes that the former is false, and few would argue that the latter is true.

The inter-generational inequity argument made by Korngold and others³² essentially says that it is unfair for the present generation to make decisions that bind and limit future generations that have no voice in the decisions.³³ Perpetual easements exercise too much “dead hand” control, and can actually lead to environmental degradation as development is forced to leap over protected tracts, causing sprawl and inefficiency. However, the present generation cannot help but make choices that affect the future, whether that choice is to develop or to conserve, and if broader conservation goals would be furthered by development on a protected parcel, proper changes can be made to the easement agreement by negotiation, exercising eminent domain, or otherwise.³⁴

Another problem attributed to conservation easements is that they freeze class and race inequities into

place. With more and more parcels being locked up in conservation, Grover Norquist, president of Americans for Tax Reform, claims that blacks and Hispanics looking to move to the suburbs are finding fewer places to live, and if there are any tracts, especially the larger ones, they are increasingly more expensive.³⁵ “There’s a reason the environmental movement is all white.”³⁶

Mr. Norquist essentially dumps Environmental Justice over on its head, claiming that efforts to improve the environment hurt minority groups because those groups cannot afford the higher prices associated with conservation easements. Until more facts are forthcoming, it is difficult to fully evaluate Mr. Norquist’s critique. However, conservation easements are neutral on their face and provide benefits to all races and classes. Whatever increase in costs that might be associated with conservation easements should be balanced against the great environmental as well as economic benefits that they provide.

Mr. Norquist also complains that the tax benefits of perpetual easements are unfairly tailored for the rich.³⁷ There is no doubt that tax deductions favor rich people more than poor people. However, perpetual conservation easements do not purport to give the same level of benefits to everyone, nor do they need to. The federal government (as well as many state governments) has chosen to confer financial benefits on any person, rich or poor and any color, willing to donate or sell at a bargain land that has conservation value. The fact that not all benefits are shared equally should not prohibit the government from promoting easements that, by their very terms, benefit more than just the donor.

32 But see Vermont Land Trust, *supra* note 16.

Some proponents of term easements question the policy of perpetual easements on ethical grounds. But, of course, every generation ties the hands of succeeding generations. If we construct a shopping center or residential development in a corn field, that is what the next generation gets. The key for each generation is to try to make intelligent choices about what future generations will need for both conservation and development. *Id.*

33 *Id.* See also Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 Va. L. Rev. 739 (2002)

34 Vermont Land Trust, *supra* note 16.

If VLT or VHCB conserves land in the wrong place, society can correct the “error.”

It is impossible for any generation to foresee all the circumstances and choices that will confront future generations. We can only make our best judgment. Sometimes our judgment will be wrong. However, society can correct our “errors,” either by negotiation or eminent domain. If, for example, VHCB and VLT acquire an easement on a property that, generations from now, becomes the perfect site for the new school or landfill, the Legislature has the authority to condemn both the underlying land and the conservation easement.

In many cases, condemnation will not be required. VLT has amended a number of its easements, without cost, to allow a road to be straightened or a power line to be moved. VLT also amended one of its earliest conservation easements, so the South Woodstock fire department could expand its facilities on adjacent, conserved land. After investigation and discussion, the parties agreed that the site was an appropriate location for the new building, and that a change in the easement was in the public interest. However, even if VLT had not agreed, the town had the power of eminent domain to condemn the land for public use. *Id.*

35 Katharine Q. Seelye, “More Families Adopting Lasting Limits to Preserve Land.” *New York Times* Section B; Column 1; National Desk; Pg. 1 (September 12, 2001).

36 *Id.*

37 *Id.*

IV. Conclusion

In conclusion, there are many reasons to prefer perpetual easements over fixed-term easements. Perpetual easements do everything that fixed-term easements do, but they do it better because they do it forever. Also, perpetual easements provide many things that fixed-term easements do not. For the easement donor, easements provide income, estate, and possibly property tax deductions. Perpetual easements also allow donors to keep land in agricultural use or keep land in the family.

For conservationists (land trusts and the like), easements cost less than fee simple title, saving scarce financial resources. When easements are made in perpetuity, easement holders avoid the costs of repurchasing or reacquiring a subsequent easement for the same land. They also make land trusts eligible

for certain government matching funds available only when land trusts purchase perpetual easements. Perpetual conservation easements foster private decision making that leads to positive externalities. Perpetual easements stabilize agricultural communities and promote reinvestment. They provide future generations with conserved land and thus leave future generations with greater flexibility in meeting future needs. Perpetual conservation easements uphold the precautionary principle and protect and promote wildlife, water quality, recreation, historical preservation, open space, agriculture, and other public goods. In short, perpetual easements protect the land forever. For all of these reasons, perpetual conservation easements should be preferred over fixed-term easements.

Appendix A: Georgia Uniform Conservation Easement Act

§ 44-10-1. Short title

This article shall be known and may be cited as the “Georgia Uniform Conservation Easement Act.”

§ 44-10-2. Definitions

As used in this article, the term:

(1) “Conservation easement” means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations, the purposes of which include retaining or protecting natural, scenic, or open-space values of real property; assuring its availability for agricultural, forest, recreational, or open-space use; protecting natural resources; maintaining or enhancing air or water quality; or preserving the historical, architectural, archeological, or cultural aspects of real property.

(2) “Holder” means:

(A) A governmental body empowered to hold an interest in real property under the laws of this state or the United States; or

(B) A charitable corporation, charitable association, or charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic, or open-space values of real property; assuring the availability of real property for agricultural, forest, recreational, or open-space use; protecting natural resources; maintaining or enhancing air or water quality; or preserving the historical, architectural, archeological, or cultural aspects of real property.

(3) “Third-party right of enforcement” means a right provided in a conservation easement to enforce any of its terms granted to a governmental body, charitable corporation, charitable association, or charitable trust, which, although eligible to be a holder, is not a holder.

§ 44-10-3. Creation or alteration of conservation easements; acceptance; duration; effect on existing rights and duties; limitation of liability

- (a) Except as otherwise provided in this article, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements, except that a conservation easement may not be created or expanded by the exercise of the power of eminent domain.
- (b) No right or duty in favor of or against a holder and no right in favor of a person having a third-party right of enforcement arises under a conservation easement before its acceptance by the holder and a recordation of the acceptance.
- (c) Except as provided in subsection (c) of Code Section 44-10-4, a conservation easement is unlimited in duration unless the instrument creating it otherwise provides.
- (d) An interest in real property in existence at the time a conservation easement is created is not impaired by it unless the owner of the interest is a party to the conservation easement or consents to it.

(e) The ownership or attempted enforcement of rights held by the holder of an easement shall not subject such holder to any liability for any damage or injury that may be suffered by any person on the property or as a result of the condition of such property encumbered by a conservation easement.

§ 44-10-4. Actions affecting easements; parties; power of court to modify or terminate easement

(a) An action affecting a conservation easement may be brought by:

(1) An owner of an interest in the real property burdened by the easement;

(2) A holder of the easement;

(3) A person having a third-party right of enforcement; or

(4) A person authorized by other law.

(b) The easement holder shall be a necessary party in any proceeding of or before any governmental agency which may result in a license, permit, or order for any demolition, alteration, or construction on the property.

(c) This article does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity.

§ 44-10-5. Validity of easement

A conservation easement is valid even though:

(1) It is not appurtenant to an interest in real property;

(2) It can be or has been assigned to another holder;

(3) It is not of a character that has been recognized traditionally at common law;

(4) It imposes a negative burden;

(5) It imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;

(6) The benefit does not touch or concern real property; or

(7) There is no privity of estate or of contract.

§ 44-10-6. Interests covered by article; interests not invalidated by article

(a) This article applies to any interest created after July 1, 1992, which complies with this article, whether designated as a conservation or facade easement, or as a covenant, protective covenant, equitable servitude, restriction, easement, or otherwise.

(b) This article applies to any interest created before July 1, 1992, if such interest would have been enforceable had such interest been created after July 1, 1992, unless retroactive application contravenes the Constitution or laws of this state or the United States.

(c) This article does not invalidate any interest, whether designated as a conservation or preservation or facade easement or as a covenant, protective covenant, equitable servitude, restriction, easement, or otherwise, that is enforceable under other law of this state.

§ 44-10-7. Construction and application of article to effect uniformity of laws

This article shall be applied and construed to effectuate its general purpose to make uniform the laws with respect to the subject of this article among states enacting it.

§ 44-10-8. Recordation of easements; revaluation of encumbered property; appeals

A conservation easement may be recorded in the office of the clerk of the superior court of the county where the land is located. Such recording shall be notice to the board of tax assessors of such county of the conveyance of the conservation easement and shall entitle the owner to a revaluation of the encumbered real property so as to reflect the existence of the encumbrance on the next succeeding tax digest of the county. Any owner who records a conservation easement and who is aggrieved by a revaluation or lack thereof under this Code section may appeal to the board of equalization and may appeal from the decision of the board of equalization in accordance with Code Section 48-5-311.

Appendix B: Qualified Conservation Contribution

26 USCS 170(h)

(h) Qualified conservation contribution.

(1) In general. For purposes of subsection (f)(3)(B)(iii), the term “qualified conservation contribution” means a contribution--

(A) of a qualified real property interest,

(B) to a qualified organization,

(C) exclusively for conservation purposes.

(2) Qualified real property interest. For purposes of this subsection, the term “qualified real property interest” means any of the following interests in real property:

(A) the entire interest of the donor other than a qualified mineral interest,

(B) a remainder interest, and

(C) a restriction (granted in perpetuity) on the use which may be made of the real property.

(3) Qualified organization. For purposes of paragraph (1), the term “qualified organization” means an organization which--

(A) is described in clause (v) or (vi) of subsection (b)(1)(A), or

(B) is described in section 501(c)(3) [26 USCS § 501(c)(3)] and--

(i) meets the requirements of section 509(a)(2) [26 USCS § 509(a)(2)], or

(ii) meets the requirements of section 509(a)(3) [26 USCS § 509(a)(3)] and is controlled by an organization described in subparagraph (A) or in clause (i) of this subparagraph.

(4) Conservation purpose defined.

(A) In general. For purposes of this subsection, the term “conservation purpose” means--

(i) the preservation of land areas for outdoor recreation by, or the education of, the general public,

(ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,

(iii) the preservation of open space (including farmland and forest land) where such preservation is--

(I) for the scenic enjoyment of the general public, or

(II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit, or

(iv) the preservation of an historically important land area or a certified historic structure.

(B) Certified historic structure. For purposes of subparagraph (A)(iv), the term “certified historic structure” means any building, structure, or land area which--

(i) is listed in the National Register, or

(ii) is located in a registered historic district (as defined in section 47(c)(3)(B) [26 USCS § 47(c)(3)(B)]) and is certified by the Secretary of the Interior to the Secretary as being of historic significance to the district.

A building, structure, or land area satisfies the preceding sentence if it satisfies such sentence either at the time of the transfer or on the due date (including extensions) for filing the transferor’s return under this chapter [26 USCS §§ 1et seq.] for the taxable year in which the transfer is made.

(5) Exclusively for conservation purposes. For purposes of this subsection--

(A) Conservation purpose must be protected. A contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity.

(B) No surface mining permitted.

(i) In general. Except as provided in clause (ii), in the case of a contribution of any interest where there is a retention of a qualified mineral interest, subparagraph (A) shall not be treated as met if at any time there may be extraction or removal of minerals by any surface mining method.

(ii) Special rule. With respect to any contribution of property in which the ownership of the surface estate and mineral interests has been and remains separated, subparagraph (A) shall be treated as met if the probability of surface mining occurring on such property is so remote as to be negligible.

(6) Qualified mineral interest. For purposes of this subsection, the term “qualified mineral interest” means--

(A) subsurface oil, gas, or other minerals, and

(B) the right to access to such minerals.

Land Use Clinic
University of Georgia River Basin Center
110 Riverbend Road, Room 101
Athens, GA 30602-1510
(706) 583-0373 • Fax (706) 583-0612
<http://www.law.uga.edu/landuseclinic/>